

which is administered in an amount "beneficial" to the exercising athlete.

Claims 1-4, 10-12, 14, 15, 17, 23 and 24 were rejected under 35 U.S.C. 102(b) over the Kober patent. This rejection is respectfully traversed as follows.

As noted in the previous amendment, the mineral salt concentration taught by Kober results in a solution which cannot be used in the manner required by the functional language in the claims. In response to the Examiner's argument that such allegations are not supported by evidence, Applicant provides herein a Declaration under 37 C.F.R. 1.132 by Dr. Brooks, the inventor in the instant application, which specifically addresses this point.

In his remarks, Dr. Brooks demonstrates that the high salt concentrations present in the Kober mineral nutrient supplements is comparable to sea water and illustrates why such solutions would not be beneficial to a person trying to recover from physical exercise. Briefly, Dr. Brooks describes the salt concentrations of physiological fluids as a contrast to Kober's mineral supplements.

In addition, the Examiner's attention is drawn to the above amendment to claim 14 which specifies the solution composition from cancelled claim 16, which was not subject to the § 102 rejection.

In view of Dr. Brooks' declaration and the amendment to the claims which emphasizes the functional characteristics of the lactates in the present invention, applicant respectfully requests that the 35 U.S.C. § 102(b) rejection of Claims 1-4, 10-12, 14, 15, 17, 23 and 24 now be withdrawn.

Claims 1-7, 10-20 and 23-27 were rejected under 35 U.S.C. § 103 over the combination of Millman in

view of Kober. This rejection is respectfully traversed.

It is admitted that Millman does not teach the use of lactate salts in a carbohydrate nutritional supplementation. However, it is argued in the rejection that the art suggests the nutritional composition claimed in this application because Kober teaches addition of lactate salts to improve the stability of such compositions. Applicant notes that the term "stability" may be misleading. Kober prescribes the use of lactate solutions for production of soluble preparations of calcium and magnesium in the presence of phosphates and alkalies, in view of the well known tendency of these substances to form insoluble calcium and magnesium phosphates and hydroxides (page 1, lines 36-50). However, Millman specifically notes that the method provided in his invention results in all of the solid nutrients dissolving rapidly and completely in tap water under ordinary usage conditions. Thus, one skilled in the art would not be led to add the lactate salts of Kober to the Millman solution. The problem Kober solved by addition of lactate (prevention of precipitation), does not exist in the composition taught by Millman which provides easily and rapidly soluble components. Therefore, one skilled in the art would not combine Kober with Millman in the manner suggested by the Examiner. The cited combination of references thus fails as a basis for the § 103 rejection.

Moreover, as discussed in Dr. Brook's Rule 1.132 Declaration, even if one were to add lactate to the solution of Millman, it would not have been obvious that such a solution would be useful as a carbohydrate nutritional supplement to beneficially

affect fluid electrolyte or carbohydrate balance during exercise and/or subsequent recovery. Rather, the evidence supplied with Dr. Brook's declaration clearly demonstrates 50 years of art references teaching away from the use of lactic acid as a nutritional supplement.

Applicant respectfully requests that the 35 U.S.C. § 103 rejection of Claims 1-7, 10-20 and 23-27 based on the Millman/Kober combination now be withdrawn.

Claims 1-27 were rejected under 35 U.S.C. § 103 over the combination of Adibi et al. in view of Kawajiri. This rejection is respectfully traversed as follows.

Applicant has previously argued that the Kawajiri reference is directed to the use of lactic acid for solution stabilization, an entirely different result than claimed in the instant invention. Thus, the Adibi and Kawajiri combination would not teach one skilled in the art to use lactate salts as a carbohydrate nutritional component in nutritional supplement for aid in recovery from exercise.

In maintaining this rejection, the Examiner cites In re Lintner as allegedly demonstrating that the addition of a component for a different purpose does not alter a conclusion of the obviousness of a novel composition. Applicant notes that in In re Lintner, the secondary references suggested the use of a sugar with conventional laundry compositions such as that disclosed in the primary reference, and stated:

"there is no departure from the prior art in terms of the result achieved by the addition of sugar, and the prima facie case of obviousness has not been overcome".

This is clearly a different situation than that of the instant invention, where the addition of lactic acid salts as a nutritional supplement is a clear departure from the prior art.

The court recognized this distinction in In re Lintner, and noted that an obviousness rejection may be rebutted where a claimed composition is shown to possess unexpectedly superior properties or advantages as compared to the prior art compositions. As discussed above, the 37 C.F.R. 1.131 Declaration by Dr. Brooks clearly demonstrates that the beneficial carbohydrate nutritional effects of lactic acid salts in the claimed composition were unexpected in view of the prior art teachings of the negative effects of lactic acid on muscle fatigue.

Thus Applicant respectfully submit that the prima facie case of obviousness is overcome and requests that the 35 U.S.C. § 103 rejection of Claims 1-27 based on the Adibi/Kawajiri combination now be withdrawn.

Applicant believes that the instant amendments and remarks obviate all grounds for rejection of the claims. Reconsideration of the application and its early allowance are respectfully requested.

The Examiner is authorized to contact applicant's undersigned representative by telephone at (415) 433-4150 if, in the opinion of the Examiner,

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and interview will in any way expedite the prosecution of this application.

Respectfully submitted,

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Atty. Docket No. STIM-1000